WONG TECK SERN

v.

MENTERI DALAM NEGERI, MALAYSIA & ANOR

HIGH COURT MALAYA, TAIPING
HASSAN AB RAHMAN JC
[CRIMINAL APPLICATION NO: 44-2-2009]
7 MARCH 2010

CRIMINAL LAW: *Emergency (Public Order and Prevention of Crime) Ordinance - Section 4(1), detention under - Habeas corpus - Whether procedural requirements not followed affecting validity of detention order - Alibi defence not rebutted - Whether grounds for habeas corpus - Right to make representation - Whether denied to detainee - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 7C, 7D*

CRIMINAL PROCEDURE: *Habeas corpus - Emergency (Public Order and Prevention of Crime) Ordinance 1969, detention under s. 4(1) - Arrest not followed by charge - Whether a procedural non-compliance affecting validity of detention order - Defence of alibi not rebutted - Whether grounds for habeas corpus - Right to make representation - Whether denied to applicant - Emergency (Public Order and Prevention of Crime) Ordinance, ss. 4(1), 7C, 7D*

CONSTITUTIONAL LAW: *Fundamental liberties - Habeas corpus - Emergency (Public Order and Prevention of Crime) Ordinance 1969, detention under s. 4(1) - Arrest not followed by charge - Whether a procedural non-compliance affecting validity of detention order - Defence of alibi not rebutted - Whether grounds for habeas corpus - Right to make representation - Whether denied to applicant - Federal Constitution, art. 5 - Emergency (Public Order and Prevention of Crime) Ordinance, s. 4(1), 7C, 7D*

This was the applicant's *habeas corpus* application on the ground that his fundamental rights under art. 5 of the Federal Constitution had been infringed and that there was procedural non-compliance on the Minister's part of the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('Ordinance') and relevant rules thereof in issuing the detention order against him. The applicant had been arrested for suspiciously being involved in a crime of murder and the detention order was issued against him under s. 4(1) of the Ordinance. The issues raised were: (1) whether

A the applicant's arrest not followed by a charge was a procedural non-compliance affecting the validity of the detention order; (2) whether the applicant's *alibi* defence not rebutted by the respondents was therefore true and so there was no basis for the issuance of the detention order; (3) whether the applicant was not clearly and
B comprehensibly informed of his right to make representation since he was not served with the proper representation forms in accordance with the Ordinance and the Advisory Board Rules – and that the Tamil interpreters put on charge to explain his rights were not in a position to explain to him in Bahasa Melayu and that he
C should have had a Chinese interpreter instead.

Held (dismissing the application):

(1) The duty to charge a person arrested under s. 3(1) of the Ordinance for the criminal offence alleged to have been
D committed subsequent to his arrest was not outlined in any of the provisions of the Ordinance or its Rules. In fact, the applicant was not able to bring to the court's attention to any specific provisions that insisted on such a requirement. For that reason, the applicant's contention that his arrest was not in
E accordance with the procedures prescribed by law had no merit and there was no longer a need to consider whether on the facts of the case, there had been such procedural non-compliance including the failure to furnish the applicant with the grounds of his arrest in a clear and comprehensible
F language at the time of the arrest. (paras 18, 19 & 22)

(2) The defence of *alibi* was neither a relevant issue nor a justified excuse to obtain a writ of *habeas corpus*. The defence of alibi would only become an issue should the prosecution opt to
G initiate any criminal proceedings against the applicant. A *habeas corpus* application may only be challenged on grounds of non-compliance with any procedural requirement and nothing else (See Federal Court in *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* in interpreting two new provisions,
H ss. 7C and 7D incorporated in the Ordinance *vide* Act A740). (paras 26-29)

(3) Since *alibi* was not a procedural requirement but a defence in a criminal charge, the court did not have any jurisdiction to rely
I on the fact on *alibi* (though not rebutted by the respondents) to review the Minister's decision in issuing the detention order. (para 30)

(4) The applicant's representation was heard by the Advisory Board in his own attendance with the presence of two advocates in the representation proceedings. It followed that the allegation that he was not clearly informed and explained of his rights to the representation could not reasonably stand. Furthermore, at the last page of the applicant's affidavit at the jurat column, there was an observable statement of 'not needed' which alluded to the fact that the applicant was fairly good in Bahasa Melayu since his affidavit was sworn in Bahasa Melayu. (paras 35 &36)

Case(s) referred to:
Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Legislation referred to:
Emergency (Public Orders and Prevention of Crime) Ordinance 1969, ss. 3(1), (3)(a), (b), (c), 4(1), 7C, 7D
Federal Constitution, arts. 5(3), (4), 140, 150

For the applicant - Manjeet Kaur; M/s Naran Singh & Co
For the respondent - Amir Nasruddin SFC

Reported by Usha Thiagarajah

JUDGMENT

Hassan Ab Rahman JC:

Background Of The Application

[1] This notice of motion was filed by the applicant who is presently detained at the Pusat Pemulihan Akhlak, Simpang Renggam, Johor based on the detention order of the first respondent the Home Minister (the Minister), applying to the court for a writ of *habeas corpus*.

[2] Generally, the writ was sought based on the reasons that there has been infringement of fundamental rights of the applicant under art. 5 of the Federal Constitution (the Constitution) and procedural non-compliance, on the Minister's part, of the provisions of the Emergency (Public Orders and Prevention of Crime) Ordinance 1969, Ord. No.5/69 (hereinafter referred to as the Ordinance) and certain Rules thereof in issuing the detention order against the applicant on 20 August 2008.

A **Facts Of The Case**

[3] (The court had summarized the facts only from the applicant's supporting affidavit and the respondents' affidavit in reply since the applicant had not filed his rebuttal to those affidavits of
B the respondents).

Based on those affidavits, the court observed the following facts:

That on 15 June 2008 at around 3.45pm, the applicant (a businessman from Sabah who owns a company branch in Sibu,
C Sarawak) was arrested at Kwong Ta Enterprise, No. 75, Jalan Tuanku Osman, Sibu, Sarawak for suspiciously being involved in a crime of murder.

[4] On 27 June 2008 at around 10.45am the applicant was then
D arrested at the compound of Menara Pehin Setiaraja Mukah, Sarawak and detained under s. 3(1) of the Ordinance.

[5] The detention was extended for investigation purposes under s. 3(3)(a) and 3(3)(b) of the Ordinance until 26 July 2008.

E Based on the report regarding the circumstances of the arrest and detention received (which unfolded the above stated facts in para 4), SAC1 Dato Mohd Rodwan bin Yusof, Senior Assistant Director of D7 of Bukit Aman Criminal Investigation Department, being the officer vested with the authority to disclose the detailed
F circumstances of the arrest and detention based on the report prepared under s. 3(3)(c) of the Ordinance, had reported the matter to the Minister. He notified the Minister, through his letter dated 25 July 2008, that the investigation could not be completed within the period of the first 30 days. The Minister had received the
G information on the same day (25 July 2008).

[6] Then, on 20 August 2008, the Minister had obtained and perused the applicant's case file that contained the documents and comprehensive reports on the detention and investigation carried out
H by the police against the applicant.

After he was satisfied that the applicant ought to be detained, the Minister, on the same date (20 August 2008) had decided that the Applicant be detained under s. 4(1) of the Ordinance for the period
I of two years with effect from 20 August 2008 at Pusat Pemulihan

Akhlak Simpang Renggam, Johor (Pusat Pemulihan). After that, a representation proceeding was held and the Applicant was present and had taken up the representation opportunity. On 18 November 2008, the advisory board after giving considerable weight to the representation put forward by the applicant had made their recommendations on the representation to the Yang Dipertuan Agong. Then, on 9 December 2008, based on the recommendations of the Board, the Yang Dipertuan Agong had given his Royal Assent to the detention order issued by the Minister under s. 4(1) of the Ordinance against the applicant

[7] Subsequent to that, a notice of motion was filed by Messrs. Naran Singh & Co. in this court on 6 April 2009 seeking for a writ of *habeas corpus*.

The Issues To Be Decided

[8] In his affidavit in support (encl. 4), the applicant alleged that:

[8.1] After his arrest, he has been not brought before the court and with that he was denied of his rights guaranteed under art. 5(4) of the Federal Constitution.

[8.2] At the time the detention order was served on him, he has neither been clearly informed of the grounds of his arrest nor been explained of the rights provided under the Ordinance, secured by the Advisory Board Rules and guaranteed by art. 5(3) of the Constitution.

[8.3] When he was removed to the Pusat Pemulihan, he was also not informed of his rights to make representation, and not served with the representation forms within the prescribed period and indeed those forms were not in accordance with the Advisory Board Rules, and

[8.4] The Advisory Board had failed to forward their recommendations to the Yang Dipertuan Agong within the stipulated period.

[9] The applicant in his supporting affidavit also accused the police of acting in *mala fide* in detaining him under s. 3(1) of the Ordinance, despite their unsuccessful attempt to frame a crime charge against him in the court of law for his alleged involvement in the murder crime.

[10] In supporting his allegation, he had exhibited 3 statutory declarations sworn by his brother and 2 employees of Tung Kiong Refrigerator in Bintulu, Sarawak that offered explanation as to his non-connection and zero-involvement with the murder crime, the one which was based in the issuance of the detention order against him (defence of *alibi*), and

[11] The applicant also claimed that the detention order was *ultra vires* s. 4(1) of the Ordinance read together with art. 140 and 150 of the Constitution and that the Minister had acted arbitrarily in issuing the detention order.

[12] The respondents, in response to the applicant's supporting affidavit had filed 12 affidavits in reply (encl. 7A-7L). The affidavits were sworn by the Minister himself and the officers involved in the issuance of the detention order, its execution and those responsible in carrying out certain related execution procedures. The applicant had not filed any affidavit in reply refuting the affidavits.

[13] On the hearing date of the application, the applicant's counsel in his oral submission, only focused his submission on three issues as follows:

i) the arrest;

ii) *alibi*; and

iii) right to representation.

[14] For that reason, the Senior Federal Counsel, in his reply also concentrated his submission on those three issues only.

[15] After hearing and considering submissions of both parties and referring to the judicial precedents submitted to the court, the court held that the applicant's application be dismissed and now the applicant is appealing against that whole decision.

Grounds Of Judgment For Dismissing The Application

The Issue Of Arrest

[16] After thoroughly reading the affidavits of both parties, the court was of the view that there were two police arrests made on the applicant ie, on 15 June 2008 and 27 June 2008.

The first arrest on 15 June 2008 which was made in Sibu because the applicant was alleged to have been involved in a murder crime (the applicant unfolded this fact in his affidavit in support in encl. 4 which was authenticated by exh. WTS1). While the second arrest on 27 June 2008 in Mukah was done by virtue of s. 3(1) of the Ordinance. The 27 June 2008 arrest was never mentioned by the applicant in his affidavit, but this fact was disclosed by SAC1 Mohd Rodwan in his affidavit at encl. 7A and verified by exh. MRY2.

Still, the statement relating to the date of arrest on 27 June 2008 was not rebutted by the applicant. However, the applicant claimed that the respondent had denied his right under art. 5(4) of the Constitution by not bringing him before the court for any charge following his arrest and not informing him clearly the grounds of his arrest in the language he can easily understand. This is one of the non-compliances on which this *habeas corpus* application was based.

[17] In resolving this issue, the court before arriving at its judgment had meticulously read all the affidavits filed and comprehensively weighed the submissions of the applicant's counsel to decide whether an arrest not followed by a charge in the court of law is considered as procedural non-compliance and that, it affects the validity of the Minister's detention order made under s. 4(1) of the Ordinance and if there was a non-compliance, whether it was actually committed.

[18] The court found that the duty to charge the person arrested under s. 3(1) of the Ordinance for the criminal offence alleged to have been committed subsequent to his arrest, was never outlined in any provisions of the Ordinance or its Rules. In fact, the applicant's counsel in his own submission has not been able to bring to the court's attention (he did not even try to do so) any specific provisions that insist on such requirement.

[19] For that reason, the court found that the applicant's contention that his arrest was not in accordance with the procedures prescribed by law stands with no merit to justify issuance of the *habeas corpus*.

[20] In this context, the court agreed with the Senior Federal Counsel's submission who had accurately invited this court to refer to the law in the Federal Court case of *Lee Kew Sang v. Timbalan*

A *Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 that involved a Minister's order under the same provision and Ordinance.

[21] At pp. 930-931 His Lordship Abdul Hamid Mohamad FCJ (as he then was) had given the following guidelines:

B

> … in a *habeas corpus* application where the detention order of the Minister made under s. 4(1) of the Ordinance … the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural compliance or not. To determine the question, the courts should look at the provisions of
C the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts,
D there has been non-compliance.

[22] Since the court is unable to find any provisions embodied in the Ordinance or incorporated in the Rules thereof, which signifies the said requirements, the court feels that there is no longer a need
E to consider whether on the facts of this case, there had been such procedural non-compliance including the failure to furnish the applicant with the grounds of his arrest in a clear and comprehensible language at the time of the arrest.

F *Issue Of Alibi*

[23] The issue of *alibi* was raised owing to the presence of the three statutory declarations ie, exhs. WTS3 which were annexed to the applicant's supporting affidavit in encl. 4. All the three statutory declarations averred that on 2 May 2008, the date specified in the
G statement of facts on which the detention order was based (encl. E) exh. SHJ1 encl. 7B (affidavit in reply of Dato' Seri Syed Hamid Albar b. S. Jaafar Albar), the applicant was not in Sibu (the alleged murder crime scene) but he was in Bintulu, Sarawak attending a business dealing and family gathering.

H

[24] The applicant's counsel submitted that the respondents had not denied the *alibi* contained in those statutory declarations, therefore the court ought to have concluded that the *alibi* as true and relied on it to declare that the Minister has no basis in issuing
I the detention order.

[25] In this context, the court fully understood the contention put forward by the applicant's counsel ie, to suggest that the Minister's detention order on 20 August 2008 had contravened the law once the court found that the *alibi* was never rebutted by the respondents in any of their affidavits.

[26] The court, in dealing with this issue, is of the opinion that alibi is neither a relevant issue nor a justified excuse to obtain a writ of *habeas corpus*. On the other hand, the court is of the view that the point on *alibi* would only become an issue in court should the prosecution opt to initiate any criminal proceeding against the applicant.

[27] Relying on the decision of the Federal Court in the case of *Lee Kew Sang*, it is crystal clear that the court is obliged to give effect to the amendments made to the Ordinance which has been in force since 24 August 1989 *vide* Act A 740, a new section of 7C was incorporated in the Ordinance introducing a new provision of law as follows:

> 7C Judicial review of act or decision of YDPA and Minister.
>
> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by … the Minister in the exercise of the discretionary power in accordance with the Ordinance, save in regard to any question on compliance with any procedural requirement in this Ordinance governing such act or decision.

[28] In addition to that, the new s. 7D defines that judicial review shall also include 'a writ of *habeas corpus*'.

[29] The Federal Court, in interpreting the two new provisions of ss. 7C and 7D, at p. 922 of the case had firmly stated that:

> The provisions of ss. 7C and 7D are clear. The effect of the amendment is that, in a *habeas corpus* application such as in this case, the detention order made by the Minister under s. 4(1) of the Ordinance may only be challenged on grounds of non-compliance with any procedural requirement, **and nothing else**. (emphasis added)

[30] Since *alibi* is not a procedural requirement but a defence in a criminal charge, it is apparent that the court shall not and indeed does not have any jurisdiction to rely on the fact on *alibi* (though

not rebutted by the respondents), to review the Minister's decision in issuing the detention order, and what more to order *habeas corpus* on the ground that the Minister had illegally issued the detention order because *alibi* has been proven.

Issue Of Representation

[31] In this context, the applicant's counsel argued that when the detention order was served on the applicant, he was never clearly and comprehensibly informed of his rights to make representation, and was not served with the proper representation forms within the prescribed period and that those forms were not in accordance with the Ordinance and the Advisory Board Rules.

[32] The counsel, in substantiating his argument, had drawn the court's attention to the facts revealed by the deponents' affidavits sworn on behalf of the respondents at encls. 7H, 7I and 7J.

[33] Those affidavits were affirmed by the officers of the Pusat Pemulihan who claimed themselves as Tamil interpreters, but were put in charge to explain the rights to the applicant. In their affidavits it was asserted that they had, in a simple Bahasa Melayu, themselves explained to the applicant the date, time and venue of the representation conference to be held and that he has the right to appear personally or with the aid of counsel of his choice.

[34] The counsel submitted that since they themselves affirmed that they are in fact Tamil interpreters, they were not qualified and not even in position to explain to the applicant in Bahasa Melayu when the applicant actually needed a Chinese (Mandarin) interpreter. According to him, on this ground alone, the court ought to have ordered the *habeas corpus*.

[35] There seems to have been merits in this submission. Nonetheless, one fact that has never been refuted by the applicant is that his representation was heard by the advisory board in his own attendance with the presence of 2 advocates namely Mr. Shanmugam and Mr. Naran Singh in a representation proceeding on the scheduled conference day ie, 5 November 2008 at 9.30am at the Pusat Pemulihan (para 5 affidavit Yus Yulandy bin Mhd. Jaafar, the Secretary of the Advisory Board, the Prime Minister's Department – encl. 7K).

[36] For that fact, the allegation that he was not clearly informed and explained of his rights to the representation cannot reasonably stand as a basis to justify this application and neither can it be considered as non-compliance to warrant the writ of *habeas corpus*. Moreover, at the last page of his affidavit (encl. 4) at the jurat column – there was observable statement of 'not needed' (Tidak perlu), which in the court's opinion had alluded that the applicant is fairly good in Bahasa Melayu since his affidavit was also sworn in Bahasa Melayu.

Conclusion

[37] For the reasons above stated, the court found that the detention order issued by the Minister was good in law since the provisions of the Ordinance and the Rules thereof were duly adhered to and the rights enshrined under art. 5 of the Constitution were appropriately protected.

[38] As such, there shall be no reason for the court to allow the applicant's application for a writ of *habeas corpus*.

[39] I hereby order so.